

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MATTHEW TUCKER,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

) Case No. DISM-03-0070

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair; and BUSSE NUTLEY, Member. The hearing was held at the Liquor Control Board Distribution Center, 4401 East Marginal Way South, Seattle, Washington, on June 29 and at the Personnel Appeals Board Office on July 19, 2004.

1.2 **Appearances.** Appellant Matthew Tucker was present and was represented by Edward Earl Younglove III, Attorney at Law, of Parr, Younglove, Lyman & Coker, P.L.L.C. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, inefficiency, and incompetence for alleged unsatisfactory performance as a social worker.

II. FINDINGS OF FACT

2.1 Appellant Matthew Tucker was a permanent employee for Respondent Department of Social and Health Services. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on August 18, 2003.

2.2 Appellant began his employment with the state of Washington in October 1997. In December 2000, the department appointed Appellant to an In-training position as a Social Worker (SW) 2. The appointment required an 18-month trial service period that would result in automatic promotion to the Social Worker 3 classification. Between December 2000 and July 2001, Appellant was supervised by Priscilla Bell-Lowe and from July 2001 through October 2001, Karen Jackson supervised Appellant. Beginning October 2001, Marcy Kelly, Social Worker 4, became Appellant's supervisor.

2.3 Effective December 10, 2001, Appellant began working at the Social Worker 3 level. At this level, Appellant was expected to provide intensive casework services to children and families on his caseload. Appellant's duties included conducting interviews with children and adults, assessing the risk of child abuse and neglect, evaluating the need for children's placement in alternative care, developing and implementing appropriate service plans (e.g. Individual Service and Safety Plans) and service agreements to ensure appropriate and timely care for children. Appellant's duties also included maintaining case records, written documentation and computerized case files.

2.4 To enable Appellant to meet deadlines and complete assignments and documentation, Ms. Kelly provided Appellant with time in the office ("protected time") from December 4, 2001 through

1 January 2, 2002. During this time period, Appellant was not assigned any new CPS cases but was
2 assigned one new referral on an open case. In addition, Ms. Kelly granted Appellant's request for
3 earphones to drown out office noise.

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5 2.5 After gathering performance feedback from both Ms. Bell-Lowe and Ms. Jackson, Ms.
6 Kelly completed Appellant's evaluation for the period of October 21, 2000 to October 20, 2001,
7 which was signed in January 2002. Ms. Kelly noted that Appellant was behind on completing his
8 investigations and was slow to transfer and close cases. Ms. Kelly documented that out of 37 cases,
9 Appellant had three referrals out of compliance. Ms. Kelly noted that Appellant had excellent
10 computer and writing skills, and she acknowledged that Appellant cared about the children and
11 families on his caseload. As part of future performance expectations, Ms. Kelly directed Appellant
12 to comply with the rules and guidelines regarding the timeframes in which to conduct initial face-
13 to-face interviews, input client SERs and transfer and close cases.

14
15 2.6 On January 18, 2002, Ms. Kelly issued Appellant a memo outlining numerous performance
16 issues, including 25 referrals that were out of compliance, eight cases that were inactive for two
17 months, his failure to write Service Episode Record (SERs) on 28 cases and his failure to perform
18 initial face-to-face interview with children. In that memo, Ms. Kelly acknowledged that Appellant
19 had advised her and other supervisors that he had been diagnosed with Attention Deficit
20 Hyperactivity Disorder (ADHD). Ms. Kelly wrote, "If you need a reasonable accommodation to
21 help you get your work completed, please provide us with your physician's written statement of
22 such." Appellant did not provide Ms. Kelly or any other supervisor with the medical information
23 requested regarding his disability and need for accommodation.

24
25 2.7 Appellant continued to struggle with his work performance and in February 2002, Ms. Kelly
26 completed a special evaluation of Appellant's work performance for the period of October 21, 2001

1 through February 8, 2002. Ms. Kelly noted that Appellant did not make efficient use of his work
2 time, noting that a total of 26, or 72 percent, of Appellant's 36 assigned cases were out of
3 compliance.

4
5 2.8 On February 28, 2002, Area Administrator Debbie Buford provided Appellant with a letter
6 of reprimand for his failure to meet agency requirements for timely case management activities as
7 identified in his performance evaluation for the period of October 21, 2000, through October 20,
8 2001. Ms. Buford reminded Appellant of his responsibility to comply with DCFS policies and
9 procedures and meet supervisory expectations concerning his overall performance. Ms. Buford also
10 warned Appellant that failure to do so could result in formal disciplinary action.

11
12 2.9 Appellant continued to demonstrate work performance below the acceptable standard for a
13 SW 3. As a result, Ms. Kelly completed a special performance evaluation of Appellant's work for
14 the period of February 9, 2002, through April 26, 2003. Ms. Kelly noted that 63 percent of
15 Appellant's cases were out of compliance and that 59 percent of his referrals remained open beyond
16 90 days and lacked summary assessments and findings letters.

17
18 2.10 As a result of Appellant's performance deficiencies, Ms. Kelly and other staff completed his
19 summary assessments and findings letters. Ms. Kelly also changed Appellant's duties in order to
20 allow Appellant to complete his paperwork. Based on the quality of work Appellant produced, Ms.
21 Kelly believed Appellant could be an asset as a social worker if he could catch up with his
22 workload. As a result, Ms. Kelly recommended that Appellant be given an opportunity to show
23 improvement by allowing him the option to voluntarily revert to a SW 2 position.

24
25 2.11 Following discussion regarding reversion, Appellant made a written request to revert from a
26 SW 3 position to a SW 2 position, in-training, effective June 7, 2002. On July 8, Ms. Buford, Area

1 Administrator, granted Appellant's request for reversion to a SW 2 position. As part of the
2 reversion, Appellant was required to complete another trial service period and, if he performed at an
3 acceptable level, the department would automatically promote him to a SW 3 position.

4
5 2.12 On September 4, 2002, Ms. Kelly wrote Appellant a letter of concern based on complaints
6 she received that Appellant was not promptly returning telephone calls, and she had concerns that
7 Appellant was not providing accurate information regarding a referral.

8
9 2.13 On October 24, Ms. Kelly provided Appellant with a letter of reprimand for his failure to
10 adhere to the Mandatory Reporting Law, the DCFS Policy and Procedures requirement for timely
11 case management activities and his supervisor's directives regarding a referral. Specifically,
12 Appellant failed to conduct a timely face-to-face interview on the referral. Rather, Appellant made
13 the face-to-face contact over two months beyond the required time.

14
15 2.14 Ms. Kelly conducted an evaluation of Appellant's performance for the period of June 9,
16 2002 through October 20, 2002. Ms. Kelly noted that Appellant's performance continued to decline
17 and that of his 36 cases, a total of 28, or 78 percent, were out of compliance. Ms. Kelly found that
18 of these 36 cases, 13 were in inactive status and that of 50 referrals assigned to Appellant, a total of
19 43, or 86 percent, were beyond the 90 days allowed to make a determination and issue the required
20 summary assessments and findings letters.

21
22 2.15 Jacquelyn Buchanan was Appellant's appointing authority when the discipline was imposed.
23 As a result of Appellant's deficient performance for the evaluation period of June 9, 2002, through
24 October 20, 2002, Ms. Buchanan contemplated disciplinary action and on March 20, 2003, she met
25 with Appellant. Appellant stated that he was not well trained and received inadequate supervision.
26 Appellant also indicated the office was chaotic and had a high workload. After reviewing his

1 training record, Ms. Buchanan found that Appellant received more training than the average
2 employee. Furthermore, Ms. Buchanan concluded Appellant had been provided with appropriate
3 supervision and constant attempts to help him succeed. During the meeting, Appellant did not raise
4 the issue of a disability or need for accommodation.

5
6 2.16 In determining the level of discipline, Ms. Buchanan considered Appellant's length of
7 service, and his employment record. After considering Appellant's response to the charges, she did
8 not did not find that he presented any mitigating facts for his deficient performance. Therefore, she
9 concluded termination was the appropriate sanction.

10 11 **III. ARGUMENTS OF THE PARTIES**

12 3.1 Respondent argues that Appellant was given ample opportunities to improve his
13 performance but failed to do so despite attempts from the department to help him succeed.
14 Respondent contends that Appellant failed to request reasonable accommodation and failed to
15 provide the agency with medical documentation regarding his disability and need for
16 accommodation. Respondent argues the department had no duty to grant an untimely request for
17 accommodation. Respondent asserts that given Appellant's performance problems, progressive
18 discipline would not have been effective and that dismissal is the appropriate sanction.

19
20 3.2 Appellant claims that he had a disability that affected his ability to perform his job. He
21 claims that his employer was aware of this disability and on several occasions granted his requests
22 for accommodation. Appellant asserts that other employees received assistance regarding their
23 disabilities but that Respondent did little to assist him to be successful. Appellant argues that the
24 discipline is not supported by the evidence, that he should receive accommodation and that
25 dismissal is not consistent with the concept of progressive discipline, and therefore, the Board
26 should set aside the dismissal.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Respondent has proven by a preponderance of the credible evidence that Appellant failed to perform the duties of a social worker at an acceptable level. In his defense, Appellant raises the issue of disability and claims that Respondent failed to accommodate his disability. In Maxwell v. Dep't of Corrections, 91 Wn. App. 171, 956 P.2d 1110 (1998), appellant Maxwell, a diabetic and manic depressive, asserted that the Board should excuse his admitted misconduct because it was caused by his medical condition. The Court of Appeals upheld the Board's ruling that without evidence that appellant Maxwell's condition caused his behavior, he could not show he was disciplined because of his condition or discriminated against because of his condition. The Court also stated that an employer's duty to accommodate does not arise "unless there is a need for accommodation." The court, quoting from Goodman v. Boeing Co., 127 Wn.2d 408, P.2d 1265 (1995), states that "the employee, of course, retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications. . . . Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employee's capabilities and available position."

4.4 In the case presented here, there is no dispute that Appellant had ADHD and that he informed his supervisors of his condition. However, there is no evidence that Appellant made a

1 request to his employer for accommodation at any time during the period his performance issues
2 were being addressed or even prior to his dismissal. Under the circumstances, Respondent was
3 under no obligation to accommodate Appellant's disability.

4
5 4.5 Neglect of duty is established when it is shown that an employee has a duty to his or her
6 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
7 of Social & Health Services, PAB No. D86-119 (1987).

8
9 4.6 Inefficiency is the utilization of time and resources in an unproductive manner, the
10 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of
11 effective operations as measured by a comparison of production with use of resources, using some
12 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*
13 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

14
15 4.7 Incompetence presumes a lack of ability, capacity, means, or qualification to perform a
16 given duty. Plaisance v. Dep't of Social and Health Services, PAB No. D86-75 (Kent, Hrg. Exam.),
17 aff'd by Board (1987).

18
19 4.8 Respondent has met its burden of proving by a preponderance of the credible evidence that
20 Appellant neglected his duty and was inefficient when he failed to initiate and conduct timely
21 investigations, make face-to-face contact on cases assigned to him and close cases within the
22 requisite 90-day time period. Appellant's performance evaluations put him on notice that there
23 were concerns with his work performance; however, Appellant failed to show any significant
24 improvements. Therefore, Respondent has proven that Appellant was not competent to perform the
25 duties of a social worker.

1 4.9 Although it is not appropriate to initiate discipline based on prior formal and informal
2 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the
3 level of the sanction that should be imposed here. Aquino v. University of Washington, PAB No.
4 D93-163 (1995).

5
6 4.10 In determining whether a sanction imposed is appropriate, consideration must be given to
7 the facts and circumstances, including the seriousness and circumstances of the offenses. The
8 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
9 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
10 program. An action does not necessarily fail if one cause is not sustained unless the entire action
11 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

12
13 4.11 We conclude that Respondent has met its burden of proving that Appellant's failure to
14 adequately and satisfactorily perform his social worker duties warrants termination. Therefore, the
15 dismissal should be affirmed and the appeal denied.

16
17 **V. ORDER**

18 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Matt Tucker is denied.

19
20 DATED this _____ day of _____, 2004.

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22 WASHINGTON STATE PERSONNEL APPEALS BOARD

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24 _____
Gerald L. Morgen, Vice Chair

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26 _____

Busse Nutley, Member

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